



May 25, 2016

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th St., SW, Room TW-A325  
Washington, D.C. 20554

**Re: Protecting the Privacy of Broadband and Other Telecommunications Services, WC  
Docket No. 16-106**

Dear Ms. Dortch:

On behalf of Atomite, Inc., a Data Privacy Management (DPM) start-up enterprise specifically designed to address government mandates that businesses interested in redeploying their customers' personal information for marketing purposes should only do so after providing those customers with bona fide transparency, choice and control, I write regarding the above-referenced Notice of Proposed Rulemaking (Broadband Privacy NPRM) released by the Commission on April 1, 2016.

General Comments to Broadband Privacy NPRM

The FCC's proposed framework for ensuring that ISP subscribers' personal information is redeployed for purposes other than the provision of broadband services only after the subscribers are provided with a clear understanding of the alternative uses, opt-in consent rights and protection against unauthorized access is comprehensive and well-intentioned, in particular given the reality that left to their own devices, most subscribers would be insufficiently aware of, informed about, equipped to decide on and compensated for the use of their property rights. That said, given the speed at which technology and corresponding business models evolve, history has shown that hard and fast rules promulgated by government regulators in this and similar contexts without significant and fluid input from industry and other third parties with subject matter expertise often leads to unintended collateral effects which can materially undermine the very objectives which underpin the government-mandated rules and regulations<sup>1</sup>.

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<sup>1</sup> The FTC was sensitive to this issue when it concluded in its seminal 2012 Privacy Report (FTC Report, *Protecting Consumers in an Era of Rapid Change: Recommendations for Businesses and Policymakers* (Mar. 2012), available at <http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>.) that "[t]he Commission agrees that a flexible, technology-neutral approach...is appropriate to accommodate the rapid changes in the marketplace and will also allow companies to innovate." More recently, Dorian Benkoil in his February 2, 2015 article entitled *Privacy vs. Policy: What Does the End of the Cookie Mean?* (<http://mediashift.org/2015/02/privacy-vs-policy-what-does-the-end-of-the-cookie-mean/>) reported that "[b]ecause the technology moves more quickly than regulators' or lawmakers' ability to draft rules to match it, [FTC Bureau of Consumer Affairs Director Jessica L.] Rich[, at a January

Given the above, it is Atomite's view that what is called for in this context is more than the establishment of a standalone set of *principles* (e.g., transparency, choice, control, privacy-by-design, security) but less than a 'set it and forget it' set of ironclad *requirements* (e.g., the use of persistent identifiers and deep packet inspection (DPI) for purposes other than network management are to be unconditionally prohibited in all circumstances); instead a hybrid approach should be taken pursuant to which a set of clear *parameters* is established by the FCC to be flushed out via a public-private initiative which is more generally referred to by the FCC in its NPRM as a "multi-stakeholder process."<sup>2</sup> This public-private multi-stakeholder initiative would be led by the FCC and enable governmental authorities, ISP providers, ISP subscribers, consumer privacy advocates, marketers, relevant trade associations, academics and innovative start-up enterprises to engage in a continuing dialogue, resulting in *industry best practices* which will evolve with the needs of ISP subscribers and innovations in the technologies and business models of ISPs<sup>3</sup>. With these industry best practices in place, those broadband providers which can provide pre-agreed kinds of evidence of their adherence to such practices should be the beneficiaries of a regulatory safe harbor<sup>4</sup>, one that offers these providers an incentive to continue to develop innovative products and services which will ultimately result in a true 'win-win-win' for ISPs and their subscribers and marketing partners<sup>5</sup>.

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21, 2015 Industry Preview conference run by AdExchanger,] called for 'tech neutral' regulations that focus on higher principles, such as [Privacy by Design, Increased Transparency and 'Usable Choice']."

<sup>2</sup> Broadband Privacy NPRM at para. 293.

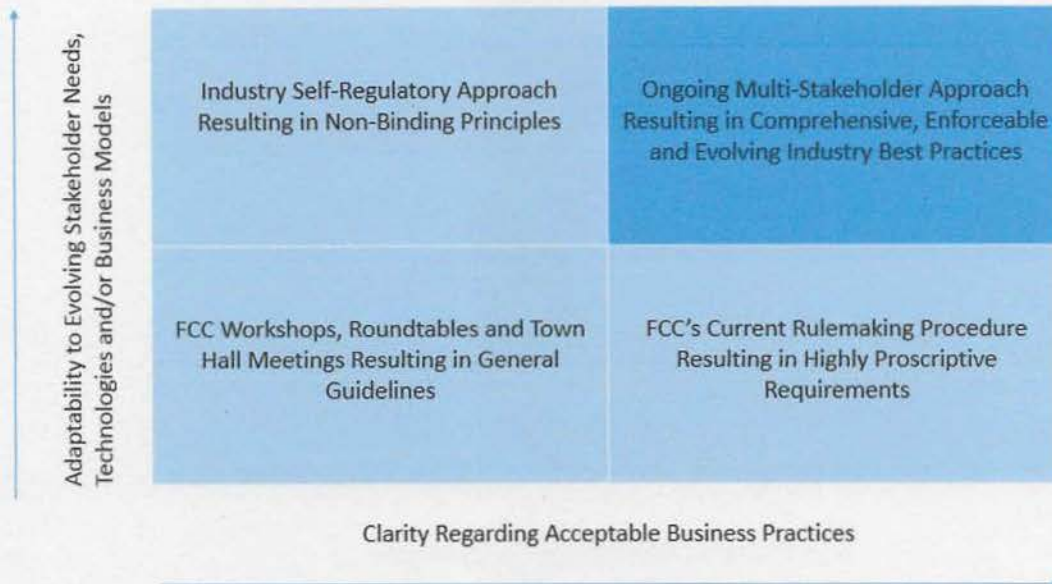
<sup>3</sup> See *Responses to Specific Questions Raised in Broadband Privacy NPRM- FCC Question No. 3 and Atomite Response No. 3* on pages 4-5 of this public comment submission for a more detailed discussion of the way in which this public-private initiative can be led and managed by the FCC, including a reference to the FTC's robust approach in this context.

<sup>4</sup> For the FCC's references to the prospect of implementing a regulatory safe harbor, see Broadband Privacy NPRM at paras. 92, 178, and 182, Appendix B at para. 58 and footnote 166.

<sup>5</sup> Should there be any doubt that ISP providers would have sufficient incentive to play a productive roll in this public-private initiative, it is important to note that FTC Bureau of Consumer Affairs Director Rich commented in her 2015 AdExchanger Industry Preview conference presentation that "we see that providing transparency and choices about privacy is increasingly a selling point for businesses. We see more and more ads touting the privacy features for products, and more and more tools being marketed that are designed to help consumers protect their privacy", leading her to conclude that "[o]ne of the greatest assets a business has is the trust of its customers. As consumers increasingly demand privacy, companies can leverage this demand as part of a broader business strategy. There are real benefits that companies can realize in competing on privacy and gaining consumers' trust."



## Alternative Regulatory Frameworks



Leveraging existing proposals for industry best practices from governmental bodies and organizations such as the FTC, GSMA, MEF, IAB, NAI, DAA, NTIA and NIST, and with the FCC having the ‘final say’ on key issues which can be communicated in the form of no-action letters similar to those issued by the U.S. Securities and Exchange Commission in the investment markets context, a “‘privacy protection seal’ that BIAS providers could display on their websites to indicate compliance with [industry best practice] guidelines”<sup>6</sup> or their equivalent indicating whether or not particular proposed ISP practices would enjoy the benefits of a regulatory safe harbor, the public-private initiative would initially determine which of the FCC’s *proposed rules* in the current Broadband Privacy NPRM, which would serve as *guidelines or parameters* in this context, would be modified, supplemented or deleted prior to initial implementation. In making such a determination, those participating in the public-private initiative would be required to make informed determinations as to which guidelines would “best balance...consumer benefits with minimizing regulatory burdens on broadband providers”.<sup>7</sup>

Prior to responding to a number of specific questions raised by the FCC’s NPRM, Atomite takes note of the public requests for an extension of time to file comments and reply comments in response to the Broadband Privacy NPRM received by the FCC to date on this matter<sup>8</sup>. Similar to the other extension

<sup>6</sup> Broadband Privacy NPRM at para. 257.

<sup>7</sup> Broadband Privacy NPRM at para.135.

<sup>8</sup> See, for example, the public requests for an extension of time to file comments and reply comments in response to the Broadband Privacy NPRM submitted by the Association of National Advertisers (ANA), the State Privacy & Security Coalition, Inc. (State Privacy & Security Coalition), the American Advertising Federation (AAF) and the American Cable Associations (ACA) available at [http://apps.fcc.gov/ecfs/comment\\_search\\_solr/doSearch?proceeding=16-106&applicant=&lawfirm=&author=&disseminated.minDate=&disseminated.maxDate=&received.minDate=&received.maxDate=&dateCommentPeriod.minDate=&dateCommentPeriod.maxDate=&dateReplyComment.minDate=&](http://apps.fcc.gov/ecfs/comment_search_solr/doSearch?proceeding=16-106&applicant=&lawfirm=&author=&disseminated.minDate=&disseminated.maxDate=&received.minDate=&received.maxDate=&dateCommentPeriod.minDate=&dateCommentPeriod.maxDate=&dateReplyComment.minDate=&)



requests, the rationale offered by the ANA for its request for extension is that “[t]his NPRM, which consists of 147 pages in the Federal Register, contains numerous proposed requirements with potentially complex impacts regarding the privacy of collected and user data. Commissioner Rosenworcel mentioned in her oral remarks during the Commission’s consideration of this matter that there are more than 500 questions raised in the NPRM. Yet the timetable for the filing of initial comments is limited to a mere 57 days from the release of the Notice”<sup>9</sup> and “[b]ecause the potential implications of the NPRM for advertising and marketing interests are significant and far-reaching, they require sufficient and thoughtful analysis.”<sup>10</sup> While the FCC ultimately concluded in response to these requests that “a timely resolution of this proceeding will be beneficial for both consumers and industry alike, providing clarity and certainty going forward, and as such, an extension of the comment deadline is not in the public interest”<sup>11</sup>, for the reasons noted above, Atomite believes it would be in the public interest for the FCC to conclude that rather than promulgate highly prescriptive requirements without availing itself of the benefits of the kind of public-private initiative described in this comment letter, it will pursue a multi-stakeholder public-private initiative calling for significant and fluid input from industry and other third parties with subject matter expertise, ultimately resulting in the development of a robust set of industry best practices and an enforcement regime designed to evolve with the needs of ISP subscribers and innovations in technologies and business models of broadband providers.

#### Responses to Specific Questions Raised in Broadband Privacy NPRM

##### **FCC Question No. 1**

“[W]e seek comment on whether we should take further steps to ensure (1) that customers have access to sufficient information regarding their BIAS provider’s privacy policies, and (2) that such information is presented in a form that is both palatable and easily comprehensible for customers. In particular, we seek comment on whether the Commission should require BIAS providers to create a *consumer-facing privacy dashboard* (emphasis added) that would allow customers to: (1) see the types and categories of customer PI collected by BIAS providers; (2) see the categories of entities with whom that customer PI is shared; (3) grant or deny approval for the use or disclosure of customer PI; (4) see what privacy selection the customer has made (i.e., whether the customer has chosen to opt in, opt out, or take no action at all with regards to the use or disclosure of her PI), and the consequences of this selection, including a description of what types and categories of customer PI may or may not be used or disclosed by a provider depending on the customer’s privacy selection; (5) request correction of inaccurate customer PI; and (6) request deletion of any categories of customer PI that the customer no longer wants the BIAS provider to maintain (e.g., online activity data), so long as such data is not necessary to provide the underlying broadband service or needed for purposes of law enforcement. We seek comment on the costs and benefits of requiring the creation of such a dashboard, and any alternatives the Commission should consider to minimize the burdens of such a program on small providers.”<sup>12</sup>

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<sup>9</sup> ANA Letter available at <http://apps.fcc.gov/ecfs/document/view?id=60001569332>.

<sup>10</sup> *Id.*

<sup>11</sup> FCC Order re Denial of Extension of Time to File BB Privacy Comments and Replies available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2016/db0429/DA-16-473A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0429/DA-16-473A1.pdf).

<sup>12</sup> Broadband Privacy NPRM at para. 95.



### **Atomite Response No. 1**

Atomite's TransPrivacy™ software service, an end-to-end data privacy management (DPM) solution for heavily-regulated B2C enterprises, in general, and mobile carriers and ISPs in particular, is a consumer-facing privacy dashboard which contains all of the features and functionality referenced by the FCC.

Atomite's offerings reward consumers who opt-in and permission Atomite wireless carrier and ISP licensees to use their "Customer Proprietary Information"<sup>13</sup> (CPI) for marketing purposes.

These customers earn affinity points (Privacy Points™) redeemable for valuable goods and services (e.g., free GBs of data; early mobile device upgrades; a discount on monthly service fees; iTunes; Netflix trial periods; and fully-paid or discounted dining, shopping, entertainment, travel, merchandise and gift card offers).

Through the use of an intuitive user interface, the customers have full control over what CPI is shared, with whom, for what purposes and for how long.

Atomite conducts digital audits of its licensees' deployment of its TransPrivacy™ offerings to ensure that its wireless carrier and ISP licensees are respecting consumer-reflected choices regarding the use of their CPI for marketing purposes, thereby enhancing the licensees' trust and goodwill with both customers and relevant governmental authorities.

### **FCC Question No. 2**

"[S]ome have argued that consumers stand to benefit from the sale of personal information collected by entities such as ISPs and other telecommunications companies. In light of these potential consumer benefits, should we accept that, upon being fully informed about the privacy rights they are exchanging for a discounted broadband price, consumers can and should be allowed to enter into such bargains?"<sup>14</sup>

### **Atomite Response No. 2**

The ultimate objective of the Broadband Privacy NPRM is to ensure a 'level playing field' as between an ISP and its subscribers as it relates to the former's collection, use and sharing of the latter's CPI. Provided that the public-private multi-stakeholder initiative referenced above develops, implements and ensures compliance with industry best practices, the result will be the kind of level playing field which will enable an ISP subscriber to make an informed decision as to whether or not to 'make a market' in his or her CPI.

More specifically, Atomite's TransPrivacy™ offering enables an ISP's subscribers to earn Privacy Points™ by permissioning the ISP to redeploy their CPI for marketing purposes. In addition, the subscribers are not forced to make a Hobson's choice by having to make a binary 'all yes' or 'all no' decision with the "all yes" decision in many cases effectively leading to the disclosure of certain subscriber CPI he or she would not otherwise share if given the opportunity to share some, but not all of his or her CPI and the "all no" decision in many cases effectively leading to no access to broadband service. Rather the subscribers are empowered to modulate the type of CPI shared, for what marketing purposes, with which third party recipients and for how long. Along the same lines, ISPs which deploy Atomite's TransPrivacy™ data privacy

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<sup>13</sup> See *supra* Appendix A (Proposed Rules), § 64.2003 Definitions, (h) *Customer Proprietary Information*.

<sup>14</sup> See *supra* para. 263.

management solution are offering their subscribers a carrot (i.e., consideration in exchange for property rights) and not a stick (e.g., no ISP service unless subscribers relinquish their property rights).

### FCC Question No. 3

"We seek comment on whether there are specific ways we should incorporate multi stakeholder processes into our proposed approach to protecting the privacy of customer PI... Would such processes be useful in developing guidelines and best practices relating to these proposed rules... Would a similar process be useful to address the privacy practices of broadband providers more generally, or in other specific areas? If so, how should the process be managed and governed? Should such processes serve as a supplement or an alternative to further rulemaking?"<sup>15</sup>

### Atomite Response No. 3

To address these questions, the FCC need look no further than the experience of the FTC and its reliance upon a broad set of methods over many years in order to adequately address consumer privacy concerns. These methods include, but are not limited to, (i) hosting privacy-related workshops, roundtables and town hall meetings, (ii) issuance of public reports based on such workshops and meetings, (ii) consultations with other government agencies such as the FCC and the Department of Commerce, (iv) testifying before Congress on privacy and data security issues and proposing legislation with respect to the same, (v) conducting outreach efforts through its consumer online safety portal, OnGuardOnline.gov, which provides information in a variety of formats to help consumers secure their computers and protect their personal information, (vi) development and public release of principles designed to serve as the basis for industry self-regulatory efforts to address privacy concerns, and (viii) issuance of warning letters and commencement of enforcement actions against companies which engage in deceptive trade practices in violation of consumer privacy rights.

For all of the reasons set forth herein, Atomite is of the view that a multi-stakeholder public-private approach which incorporates significant and fluid input from industry and other third parties with subject matter expertise will result in the development of a set of industry best practices designed to evolve with the needs of ISP subscribers and innovations in technologies and business models of broadband providers, the kind of evolution which historically has not resulted from hard and fast rules promulgated by government regulators, no matter how well-intentioned.

Respectfully submitted,



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<sup>15</sup> See *supra* para. 293.